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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1188

PAUL E. SULLIVAN, ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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BRIEF IN OPPOSITION TO PETITION

QUESTIONS PRESENTED

The Petitioners request a writ of certiorari to review the orders of the Supreme Court of Appeals of Virginia entered in the two captioned cases. The orders of the Virginia Court dismissed these appeals

on the basis that the appeals were not perfected in the manner provided by law in that the opposing counsel was not given reasonable written notice of the time and place of the tendering of the transcript and a reasonable opportunity to examine the original or true copy of it. (Rule 5:1 § 3 (f)). The question presented to the court therefore becomes whether the Supreme Court of Virginia, or any court, can set reasonable non-discriminatory rules of procedure for the orderly processing of appeals.

The action in the trial court was one for injunctive relief. Since Dr. Freeman and his family now reside in Pakistan, the relief requested is no longer appropriate (Petition page 9, note 6). The question now before this Court, is whether the expulsion from membership of Mr. Sullivan violated his right of free speech as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

STATEMENT OF FACTS

The defendant corporation, LITTLE HUNTING PARK, INC., was organized as a private non-profit club. The purchase of a membership was required, dues were collected, a membership committee was established and the adopted by-laws required approval of application of membership by the Board of Directors. These same by-laws provided for the procedure to expel a member. The initial by-laws restricted membership to the adjacent community and, in effect, placed a geographical limitation on the residence of the membership.

Judgment was entered in Sullivan on April 12, 1967. Under Rule 5:1 § 3 (f) of the Supreme Court of Appeals of Virginia, the appellant must tender the transcript to the tried within 60 days after final judgment. Allowing for Sunday, June 11, 1967, the final day for tender of the transcript was June 12, 1967.

On June 9, 1967, Friday, counsel for petitioners mailed a letter to counsel for defendants that on that day he was tendering the transcript to the trial judge. The letter was received by counsel for defendants on Monday morning, June 12, 1967.

Rule 5:1 § 3 (f) further provides: "Counsel tendering the transcript or statement shall give reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it". In *OCEAN ACCIDENT CORP. v. HALEY* 158 Va 692, 164 SE 538, the Virginia Court in construing this wording stated "that the provision of the statute is mandatory, and that the notice was not reasonable within the plain meaning of its terms, which are jurisdictional".

The transcript was lengthy and contained many errors (Petition, page 21). The question of reasonable notice prior to the tendering is not applicable for the transcript was tendered before notice of its tendering was received.

On Friday, June 16, 1967, before the trial judge at 1:20 P.M. (Petition, page 22) the transcript was delivered to counsel for defendants. At the time the defendants' counsel raised the question of notice and the trial judge stated that the sufficiency notice was to be decided by the appellate court and he would merely note that he was tendered the transcript on June 12, 1967 at 9:00 A.M.

AUTHORITIES

The Supreme Court of Appeals of Virginia relied on *SNEAD v. COMMONWEALTH*, 200 Va 850, 108 SE 2d 399, in dismissing the appeal of the petitioners. In *SNEAD*, counsel for the defendant served notice on the Commonwealth Attorney at 7:00 P.M. on June 16, 1958 that on that same day he would tender the narrative

of the evidence. The tender was made at the residence of the trial judge at 7:30 P.M. that same evening. In dismissing the appeal the court held that the notice was not reasonable and stated "the plain language of the Rule requires counsel to give opposing counsel reasonable written notice of the time and place of tendering the transcript or narrative of the evidence and to give him a reasonable opportunity to examine and not the trial judge".

The petitioners cite *COOK v. VIRGINIA HOLSUM BAKERIES, INCORPORATED*, 207 Va 815, 153 SE 2d 209, in their petition as authority as to the facts of the case determining whether notice is reasonable. In *COOK*, counsel served notice on October 15, 1965 that a narrative of the evidence would be submitted to the trial judge on October 20, 1965. The narrative consisted of twelve pages and, under the circumstances, the notice was reasonable. This case is distinguished from the instant case in that the tender by the petitioners to the trial judge was made prior to the opposing counsel's receipt of the notice.

In *N.A.A.C.P. v. ALABAMA*, 357 U.S. 449, the Alabama court was inconsistent with their own prior holdings in refusing to grant an appeal and this court felt justified in reviewing the contempt conviction in the lower court. In the instant case, the Supreme Court of Appeals of Virginia was consistent with its prior holdings. See *SNEAD v. COMMONWEALTH*, supra, *COOK v. VIRGINIA HOLSUM BAKERIES, INCORPORATED*, supra, *HYSON v. DODGE*, 198 Va 792, 96 SE 2d 792, *VIRGINIA HOME FOR INCURABLES v. COLEMAN*, 164 Va 230, 178 SE 2d 908, *TYSON v. SCOTT*, 116 Va 243, 81 SE 77, *CLINCH VALLEY LUMBER CORP. v. HAGAN ESTATES*, 167 Va 1, 187 SE 440, *CEDAR WORKS v. HARPER*, 129 Va 481, 106 SE 516.

In *STAUB v. CITY OF BAXLEY*, 355 U.S. 313, Justice Frankfurter in his dissent stated:

> The relevance of a state procedure requiring that constitutional issues be presented in their narrowest possible scope is confirmed by the practice of this court. The court has long insisted, certainly in precept, on vigorous requirements that must be fulfilled before it will pass on constitutionality of legislation, on avoidance of such determination even by strained statutory construction, and on keeping constitutional adjudication, when unavoidable, as narrow as circumstances will permit.

In *STAUB*, this court found the ordinance in question repugnant to the constitution on its face and that a federal question did exist.

In the instant case, the expulsion of a member of a private club in accordance with its existing by-laws is not, on its face, repugnant to the Constitution of the United States.

The petitioners rely on the guarantee of free speech in the First and Fourteenth Amendments of the Constitution of the United States as the federal question to enable this court to grant a writ of certiorari to the Supreme Court of Appeals of Virginia when the jurisdictional procedures of that court have not been followed.

The First Amendment and the Fourteenth Amendment prohibit the Congress and any state from curtailing the right of free speech. The petitioners contend that since LITTLE HUNTING PARK, INC. performs a function that is also performed by the State, LITTLE HUNTING PARK, INC. becomes a "public figure" and within the purview of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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